

No. 9989

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IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

HYMAN HOWARD GOODMAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

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FILED

APR 23 1942

PAUL P. O'BRIEN,

CLERK

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I

We fully agree with the Government's argument that the verdict should be affirmed if there was substantial and competent evidence to sustain it, for this court will not go into the weight of the evidence.

However, we submit that the Government has utterly failed to meet the real issue in this case, *i. e.*, was there any substantial and competent evidence to sustain the verdict?

From the outset, in the statement of facts in our main brief, we have taken the view that the evidence must be looked at in a light most favorable to the Government. The Government concedes that that statement of facts is fair and complete (Government's Brief p. 4). Nevertheless, the Government has failed to point to a single fact or circumstance, upon which a finding could be based that

there was a conspiracy or an intent to export the diamonds without a license.

We have conceded all along that the evidence shows that the diamonds were being purchased, by persons who had no export license, for the purpose of being exported to Japan. However, there was nothing criminal or unlawful about that.

The Government states (Government's Brief p. 4) that appellant admitted that there was sufficient evidence "to show a combination, conspiracy or agreement to purchase industrial diamonds for the purpose of exportation to Japan." The facts were admitted, but not that there was a "conspiracy." There was nothing conspiratorial about any of the transactions in which Goodman participated. They were open and fully legitimate.

The Statute, Presidential Proclamation and the Regulations (quoted on pp. 14-17 of our main brief) did not require any license for the purchase or sale of diamonds intended for export. A license had to be obtained only by the actual exporter but not before the clearing of the goods through the port of exit.*

*Export Control Regulations and Export Control Schedule No. 1, published by the Administrator of Export Control, effective April 15, 1941 (which dealt with export licenses) provided:

"4. WHO MAY APPLY.

"a. *Applications may be made by a corporation partnership, individual, or their duly authorized agent, who is in fact the exporter of the goods, except when the proposed shipment consists of unused metal working machinery, in which case applications must be made by the manufacturer* * * *

"5. WHEN TO APPLY.

"a. *Applications may be made at any time prior to the clearing of the goods through the port of exit."*

There is no question that in a conspiracy it is immaterial whether the crime was actually consummated. Consequently, it was not necessary for the Government to prove that the diamonds left the United States for Japan without a license. However, and this is the crux of the case, it was necessary to show that an actual intent was shared by Goodman and one or more other persons to export them without first obtaining a license. There is not a scintilla of evidence to show such intent by anyone.

It is needless again to discuss all of the facts, after the full factual resume in our main brief. We wish, however, to correct the following misstatement in the Government's brief (p. 5):

"After the first shipments had been made to Japan Takahashi told Goodman that he had received letters from Japan referring to the quality of the industrial diamonds and demanding extra good quality [R. 30-31]."

There is no evidence whatsoever that any shipments were ever made to Japan. Pages 30-31 of the record, to which this paragraph refers, contain no such testimony. In our main brief (App. Br., pp. 26-27) we copied and fully discussed this evidence by Takahashi, but in view of this misstatement we beg leave to repeat it herein. Takahashi's testimony was as follows [R. 30-31]:

"Q. Did you ever have a conversation with Mr. Keeler about hearing from anyone in Japan regarding diamonds that had been sent? A. No, I did not.

The Witness: I discussed with Keeler the quality of the diamonds and told him I didn't think the quality of the first sample was very good. I spoke occasionally about the quality and that the price was very high.

Q. Did you say anything to him about anyone advising you as to the quality or the price? A. I told him that I had received letters quite a bit from Japan in which they referred quite a lot to the quality; I told him that.

Q. What did you tell him about those letters that you had received concerning the quality? A. The demand that was made by Japan was that they wanted extra good quality; and I told him, not being experienced, even though not being experienced in diamonds, I didn't think the quality was very good.

Q. Was anyone else present when you told Mr. Keeler that? A. Mr. Goodman was there, and Mr. Takizawa was there at times."

Takahashi thus squarely testified that he had not heard from anyone in Japan regarding the sending of diamonds, but merely told Keeler and Goodman that he received letters that Japan wanted good quality. There is therefore nothing even remotely indicating that any shipments had been made to Japan.

Furthermore, even if the letters to Takahashi from Japan had actually stated that shipments of diamonds had been made, they would be purely hearsay statements to Takahashi by his Japanese correspondent. The letters would then have no value as evidence that shipments were actually made.

It is true that in conspiracy cases circumstantial evidence must frequently be resorted to by the Government, but this is because

“In conspiracy cases direct evidence of conspiracy is rarely obtainable.”

Simpson v. U. S., 4 Cir., 11 Fed. (2d) 591, 592.

In this case, however, the alleged main conspirators, *i. e.*, Takahashi, Takizawa and Nakauchi, pleaded guilty and as Government witnesses answered fully all questions propounded to them. Direct evidence was thus available in this case.

Why did not the Government prove through these witnesses that they intended to export the diamonds without a license and that Goodman knew about such intent?

On the contrary, Takahashi, who was the only one to be questioned about the matter, testified that the intention was to obtain an export license [R. 21, 37].

The Government never attempted to show, through its own cooperative witnesses, that at any time thereafter either Takahashi or the others, with Goodman's knowledge, changed their minds and conspired to export the diamonds without first obtaining a license.

Oras v. U. S., 9 Cir., 67 F. (2d) 463, quoted on p. 24 of our main brief.

As we anticipated, the Government refers to Nakauchi's testimony about his trip to San Francisco with a friend who was returning to Japan and about a package which he left at a hotel, as a probative element in its case. Our main brief (App. Br., pp. 20-25) fully discussed this in-

cident and showed that not only was the evidence inadmissible, but also that it was entirely innocuous and sustained no part of the Government's case.

Assuming *arguendo* that this unidentified friend of Nakauchi did thereafter export diamonds to Japan, of which there is no evidence, it must be presumed—in the absence of any evidence to the contrary and under the presumption of innocence (*Gung You v. Nagle*, 9 Cir., 34 Fed. (2d) 848, 850)—that he had an export license and exported the diamonds lawfully.

It is noteworthy that Nakauchi, a Government witness, was never asked by the Government about the name or identity of this friend who was returning to Japan. If, as argued by the Government, the jury could infer that Nakauchi's departing friend took the diamonds to Japan, then should not the Government have established his name and the fact that he had no license?

Would not that evidence have been so much more potent than the conjecture upon which the Government is now relying?

We submit that this case comes within the principle laid down by the Supreme Court in *Interstate Circuit v. United States*, 306 U. S. 208, 226, that:

“The production of weak evidence when strong evidence is available can lead only to the conclusion that the strong would have been adverse. *Clifton v. United States*, 4 How. 242, 247. Silence then becomes evidence of the most convincing character.”

The same thought was recently expressed by this court in *Hann v. Venetian Blind Corp.*, 9 Cir., 111 Fed. (2d) 455, 459, as follows:

“* * * when there is material testimony which would establish a fact in issue in the present ability of the litigant to present and he fails to do so, and fails to offer a reasonable excuse for such failure, the presumption follows that such testimony, if presented would be against such party * * *”

We conclude this portion of our reply with the repetition that (a) the evidence shows merely the purchase and sale of diamonds to be exported to Japan, by persons who had no export license, but who intended to obtain a license before exportation, (b) the Government has failed to point out a single evidentiary fact or circumstance from which it could be inferred that there was an intent by anybody to export the diamonds without a license, and (c) there is no proof in the record before this court of any conspiracy or the commission of any crime by any of the defendants, despite the fact that some of them pleaded guilty for reasons best known to themselves.

II.

Even if it is assumed—without conceding—that there is any evidence in the record that Takahashi or the others intended to export the diamonds without a license, the Government has failed to point out any evidence that Goodman knew about such a criminal intent.

III.

Our argument is predicated primarily upon the contentions (1) that there is no evidence of a conspiracy or crime on the part of any of the defendants and (2) that if the court should hold that there is evidence that a crime was intended by Takahashi or the other Japanese defendants, there is no evidence that Goodman knew about it.

If this court will agree with either of these contentions then Goodman's conviction should be reversed and it becomes unnecessary to consider the effect of the case of *U. S. v. Falcone*, 109 Fed. (2d) 579, 311 U. S. 205, which is discussed in the latter part of our main brief. It is only in the event that this court should overrule our primary argument and hold that there is evidence of both the commission of a crime and of Goodman's knowledge of the criminal intent, that it becomes important to determine the question whether a supplier of innocent goods is guilty of conspiracy because he knows that the buyer intends to use them for illicit purposes.

The Government argues (Government's Brief, p. 27) that *U. S. v. Falcone* does not apply for the reason that Goodman was more than a supplier of goods and actively participated in a conspiracy. The evidence is all to the contrary.

Goodman's various activities were confined solely to supplying diamonds to Takahashi. Once the diamonds were purchased by Takahashi, Goodman had nothing further to do with them.

Goodman's acts were therefore in no way different from the acts of the five defendants in the case of *U. S. v. Falcone, supra*, whose convictions were reversed.

The full opinion of the Supreme Court in *U. S. v. Falcone* is printed as Appendix 1 in our main brief (pp. 37-40). However, the opinion of the Circuit Court of Appeals (109 Fed. (2d) 579) sets forth the facts in greater detail. We have therefore copied the pertinent part of the opinion of the Circuit Court as an appendix to this reply brief [pp. 11-16]. Upon examination of the latter opinion the similarity between Goodman's acts in this case and the acts of the five defendants in that case will be apparent.

We therefore submit that Goodman's conviction should be reversed, under the authority of *U. S. v. Falcone*, even if this court should hold that there is evidence of a conspiracy by Takahashi and others to export the diamonds without a license.

IV.

The Government attempts to justify the admission of Nakauchi's testimony about the San Francisco trip, which was clearly hearsay and incompetent, on the ground that it related to acts and declarations of co-conspirators (Government's Brief, pp. 28-31).

The fallacy with that argument is that there is no independent evidence that a conspiracy existed, which is a prerequisite to the admission of acts and declaration of

co-conspirators (*Mayola v. U. S.*, 9 Cir., 71 Fed. (2d) 65, 67, discussed on p. 24 of our main brief).

V.

We respectfully submit that the Government's brief has failed to show any evidence in the record to sustain Goodman's conviction and that the judgment appealed from should be reversed.

Respectfully submitted,

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APPENDIX.

U. S. v. Falcone, 109 F. (2d) 579.

L. HAND, *Circuit Judge*.

These appeals are from convictions for a conspiracy to operate illicit stills. There were originally sixty-eight defendants, but the appeals before us concern only eight, which may be divided into two groups: one those of the appellants, Salvatore and Joseph Falcone, Alberico, John and Nicholas Nole; the other, of Grimaldi, Graniero and Soldano. Two other defendants, Milozzo and Melito, have withdrawn their appeals. The second group were actual distillers; the first supplied them and other distillers with sugar, yeast, and cans, out of which the alcohol was distilled, or in which it was sold. The evidence disclosed that in the year 1937 and 1938 within a radius of fifty miles from the City of Utica some twenty-two illicit stills had been set up, which were in each case to some extent operated after the same pattern; that is to say, real property was bought or leased, motor cars were registered, and applications for electric and water services were made, all in fictitious names; the equipment and materials were bought from the same persons; and the distillers frequented the same cafe or saloon, where they talked together. Grimaldi, Graniero and Soldano were all operators of one or more stills; the evidence of their guilt was ample; and they complain only of the manner in which the trial was conducted. We shall reserve their objections till the end, because the most serious matter is as to the sufficiency of the evidence to support the verdict against the others.

The case against Joseph Falcone was that during the year 1937 he sold sugar to a number of grocers in Utica,

who in turn sold to the distillers. He was a jobber in Utica, and bought his supply from a New York firm of sugar brokers; between March first and September 14, 1937, he bought 8,600 bags of sugar of 100 pounds each, which he disposed of to three customers: Frank Bonomo & Company, Pauline Aiello, and Alberico and Funicello, all wholesale grocers in Utica. Some of the bags in which this sugar was delivered were later found at the stills, when these were raided by the officials; and Falcone was seen on one occasion assisting in delivering the sugar at Bonomo's warehouse, when a truckload arrived. His business in sugar was far greater while the stills were active than either before they were set up, or after they were seized, and we shall assume that the evidence was enough to charge him with notice that his customers were supplying the distillers. The evidence against Salvatore Falcone went no further than to show in various ways that he helped his brother in purchase of sugar during the period in question; there is really nothing to show that he knew its eventual destination. However, since in the view we take of the law he was equally innocent if he did, in disposing of his case we shall assume that he did know. Alberico was a member of the firm of Alberico and Funicello who, as we have just said, were buyers from Joseph Falcone. Alberico's purchases and sales of sugar also varied with the activity of the stills. In the first three months of 1937, when there were five or six of these operating in or about Utica, his purchases ran up to over a half-million pounds; after they had been raided in April, his business fell off to very little; when they became active again in September, his purchases rose again. A like correspondence, though less exact, was proved for the early part of the year 1938. A jury might

also have taken the conversation which he had with one of the distillers, Morreale, as evidence of his knowledge of the kind of business that he was supplying. While the stills were active, Alberico also did a large business in five-gallon cans which he sold direct to the distillers. Many cans sold by him were found at the stills when they were raided. The evidence against Nicholas Nole consisted of his sales of yeast and cans to the distillers. The prosecution proved that in the spring of 1937 he had ordered and received shipments of imported yeast through a forwarding company of which he was the owner; and that in July and August of that year he bought of the Atlantic Yeast Company 8,300 pounds of yeast packed in wrappers, made expressly for the "Acme Yeast Company" a name under which he did business by virtue of a certificate, taken out for him by a cousin. Many of these wrappers were found at several of the stills. The case against John Nole depended upon the assistance which he gave his brother, Nicholas, and upon his being distributor for the National Grain Yeast Company for Utica during the years 1937 and 1938, a number of whose wrappers were found at the stills. Again we shall assume that the Noles knew that Nicholas's customers were illicit distillers.

In the light of all this, it is apparent that the first question is whether the seller of goods, in themselves innocent, becomes a conspirator with—or, what is in substance the same thing, an abetter of—the buyer because he knows that the buyer means to use the goods to commit a crime. That came up a number of times in circuit courts of appeal while the Eighteenth Amendment was in force, and the answer was not entirely uniform. The first case we have found is *Pattis v. United States*, 9 Cir., 17 F. 2d

562, where, although the accused appears to have been in fact more closely connected with the buyer's crime than merely as a seller, the court affirmed a charge to the jury that he was guilty if he merely had notice of the future destination of the goods. That appears to be the settled doctrine in that circuit. *Vukich v. United States*, 9 Cir., 28 F. 2d 666, 669; *Borgia v. United States*, 9 Cir., 78 F. 2d 550, 555. The same is true of the Seventh Circuit. *Anstess v. United States*, 7 Cir., 22 F. 2d 594; *Hubinger Company v. United States*, 7 Cir., 64 F. 2d 772. And of the Sixth. *Rudner v. United States*, 6 Cir., 281 F. 2d 516, 520. The Fifth has, however, held otherwise, though by a divided court, *Young v. United States*, 5 Cir., 48 F. 2d 26. In that case the judges differed because of their interpretation of *Edenfield v. United States*, 273 U. S. 660, 47 S. Ct. 345, 71 L. Ed. 827, which, on the authority of *United States v. Katz*, 271 U. S. 354, 46 S. Ct. 513, 70 L. Ed. 986, reversed a conviction upon a count for conspiracy to manufacture liquor without a license. The indictment also contained a count for conspiracy to manufacture liquor contrary to the National Prohibition Law, 41 Stat. 305, and the conviction on this the court did not disturb; the question was whether in doing so it had held that the mere sale of materials for making a still, and of sugar and meal to make liquor, was enough to convict. The opinion below (*Edenfield v. United States*, 5 Cir., 8 F. 2d 614) indicated that there had been nothing more to hold the seller, but when the same court in *Young v. United States*, *supra*, (5 Cir., 48 F. 2d 26), came to consider the effect of the reversal, the majority said that there had in fact been much more; i. e., that the accused had taken part in setting up the stills, and in selling the liquor after it was made. We do not think, therefore, that

Edenfield v. United States, *supra*, (273 U. S. 660, 47 S. Ct. 345, 71 L. Ed. 827), should be regarded as passing upon the point. We are ourselves committed to the view of the Fifth Circuit. United States v. Peoni, 2 Cir., 100 F. 2d 401. In that case we tried to trace down the doctrine as to abetting and conspiracy, as it exists in our criminal law, and concluded that the seller's knowledge was not alone enough. Civilly, a man's liability extends to any injuries which he should have apprehended to be likely to follow from his acts. If they do, he must excuse his conduct by showing that the interest which he was promoting outweighed the dangers which its protection imposed upon others; but in civil cases there has been a loss, and the only question is whether the law shall transfer it from the sufferer to another. There are indeed instances of criminal liability of the same kind, where the law imposes punishment merely because the accused did not forbear to do that from which the wrong was likely to follow; but in prosecutions for conspiracy or abetting, his attitude towards the forbidden undertaking must be more positive. It is not enough that he does not forego a normally lawful activity, of the fruits of which he knows that others will make an unlawful use; he must in some sense promote their venture himself, make it his own, have a stake in its outcome. The distinction is especially important today when so many prosecutors seek to sweep within the drag-net of conspiracy all those who have been associated in any degree whatever with the main offenders. That there are opportunities of great oppression in such doctrine is very plain, and it is only by circumscribing the scope of such all comprehensive indictments that they can be avoided. We may agree

that morally the defendants at bar should have refused to sell to illicit distillers; but, both morally and legally, to do so was *toto coelo* different from joining with them in running the stills. State ex rel. Dooley v. Coleman, 126 Fla. 203, 170 So. 722, 108 A. L. R. 326, accords with this view.

For these reasons the prosecution did not make out a case against either of the Falcones, Alberico, or John Nole; and this is especially true of Salvatore Falcone. As to Nicholas Nole the question is closer, for when he began to do business as the "Acme Yeast Company", he hid behind the name of a cousin, whom he caused to swear falsely that the affiant was to do the business. Yet it seems to us that this was as likely to have come from a belief that it was a crime to sell the yeast and the cans to distillers as from being in fact any further involved in their business. It showed a desire to escape detection, and that was evidence of a consciousness of guilt, but the consciousness may have as well arisen from a mistake of law as from a purpose to do what the law in fact forbade. We think therefore that even as to him no case was made out.

(The remaining portion of the opinion has been omitted for the reason that it deals with other questions which are not pertinent to this case.)